SUPREME COURT, U. S.

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In The

Supreme Court of the United States

October Term, 1973

No. 73-1751

Ringsby Truck Lines, Inc., et al.
Petitioners,

v.

The National Small Shipments Traffic Conference, Inc. and Drug and Toilet Preparation Traffic Conference
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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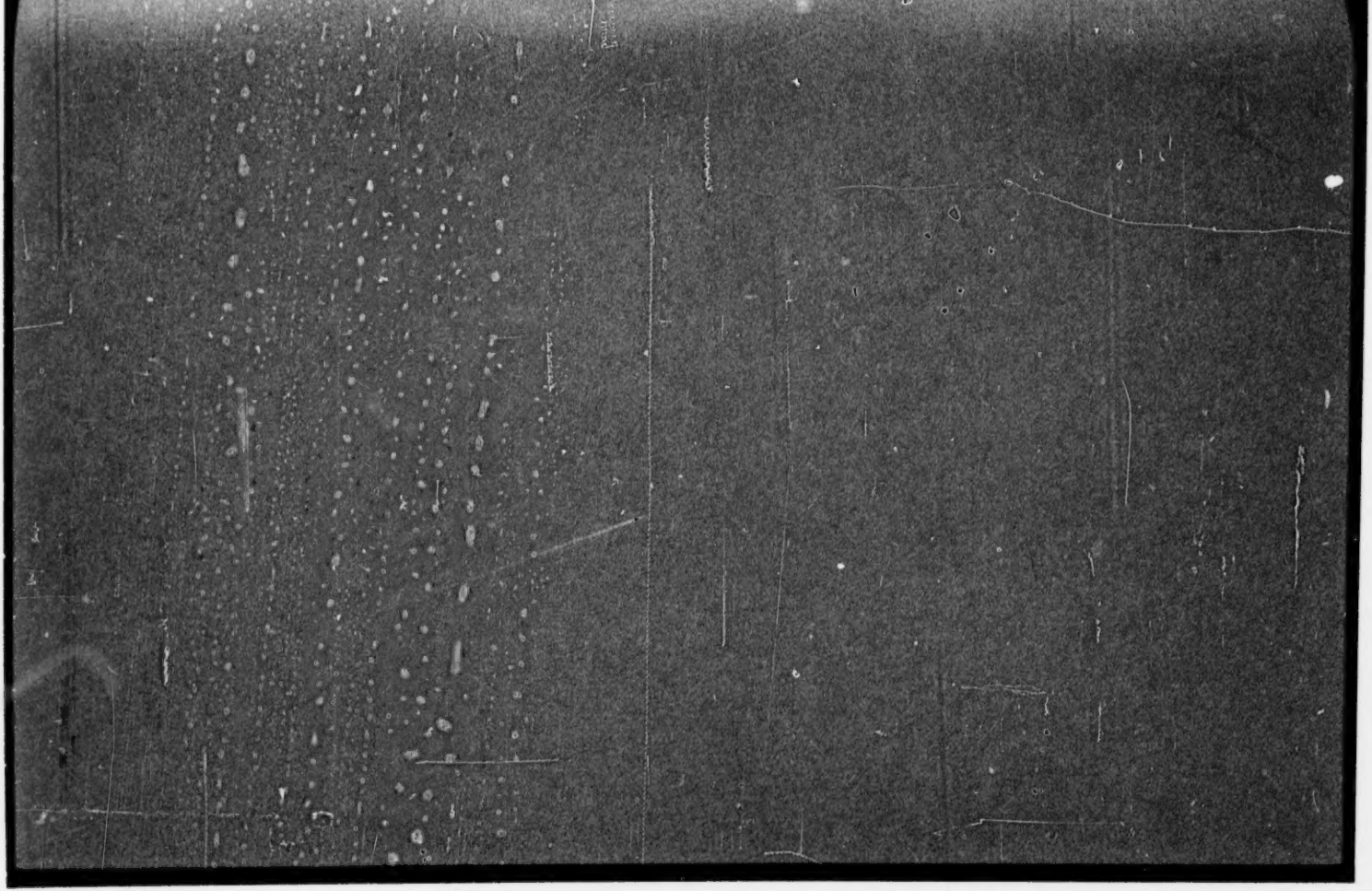

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR ISSUANCE OF THE WRIT	5

AUTHORITIES CITED

Cases:

Admiral Merchants Motor Freight, Inc. v. *U. S.*, 321 F. Supp. 353 (D. Colo. 1971), aff'd *per curiam*, 404 U.S. 802 ..... Fn. 2, p. 6, 7, 8, 9, 11

Atlantic Coast Line R. Co. v. *Florida*, 295 U.S. 301, 309 (1935) ..... Fn. 6, p. 10, 13

Brough v. *Strathmann Supply Co., Inc.*, 358 F.2d 374 (3rd Cir. 1966) 11

De Funis v. *Odegaard*, 42 L.W.K. 4578 (April 23, 1974) 10

I.C.C. v. *Atlantic Coast Line R. Co.*, 383 U.S. 576 (1966) 11

Increased Class and Commodity Rates, Transcontinental, 326 I.C.C. 397 (1966) 3

Increased Class and Commodity Rates, Transcontinental, 329 I.C.C. 420 (1967) 2

Mechling Barge Lines, Inc. v. *U. S.*, 368 U.S. 324 (1961) 9

Montana-Dakota Utilities Co. v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951) 8

National Industrial Traffic League v. *U.S. and I.C.C.*, 287 F. Supp. 129 (D. D.C. 1968), aff'd *per curiam*, 393 U.S. 535 (1969) ..... Fn. 1, p. 5

AUTHORITIES CITED—Continued

	Page
National Small Shipments Traffic Conference, et al. v. *Ringby Truck Lines, et al.*, 409 U.S. 943 (1972), 34 L.Ed. 2d 215, 93 S. Ct. 292	5
Pennsylvania Railroad Co. v. *U. S.*, 363 U.S. 202 (1960)	12, 13
Public Service Commission v. *Brashear Freight Lines*, 312 U.S. 621 (1941)	10
Ringsby Truck Lines, Inc., et al. v. *United States, et al.*, 263 F. Supp. 552 (D. Colo. 1967)	4
St. Paul Mercury Indemnity Co. v. *Red Cab Co.*, 303 U.S. 282 (1938)	11
Smith v. *Sperling*, 354 U.S. 91 (1957)	11
Texas Electric Ry. Co. v. *Eastus*, 25 F. Supp. 825 (N.D. Tex. 1938), aff'd *per curiam*, 308 U.S. 512	11
United States v. *I.C.C.*, 337 U.S. 426 (1949)	12, 13
United States v. *Munsingwear*, 340 U.S. 36 (1950)	Fn. 5, p. 9

Interstate Commerce Act

National Transportation Policy

Section 17(9), 49 U.S.C. § 17(9)	4, 13
Section 204a, 49 U.S.C. § 304a	Fn. 5, p. 10
Section 216(g), 49 U.S.C. § 316(g)	3, 11

Judicial Code of United States

Section 1253, 28 U.S.C. § 1253	3
Section 1291, 28 U.S.C. § 1291	3
Section 1331, 28 U.S.C. § 1331	11
Section 1332, 28 U.S.C. § 1332	11
Section 1336, 28 U.S.C. § 1336	13
Section 1336(a), 28 U.S.C. § 1336(a)	4
Section 2154(1), 28 U.S.C. § 2154(1)	2
Section 2321, 28 U.S.C. § 2321	2, 8, 11, 13, 14
Section 2325, 28 U.S.C. § 2325	3, 4, 13

AUTHORITIES CITED—Continued

Page

Miscellaneous:

Rules:

U.S. Sup. Ct. 10 6
U.S. Sup. Ct. 19(1) 5
U.S. Sup. Ct. 23 6

Fed. R. Civ. P. 8(a) 6
U.S. CONST., art. III § 2 6

IN THE

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OCTOBER TERM, 1973

No. ———

RINGSBY TRUCK LINES, INC., ET AL.
Petitioners,

v.

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC. AND DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A, *infra*, pages 1a to 11a. The opinion of the three-judge United States District Court for the District of Colorado, as yet unreported, appears at Appendix B, *infra*, pages 12a to 17a. The report and

order of the Interstate Commerce Commission which the District Court reviewed, *Increased Class and Commodity Rates, Transcontinental*, 329 I.C.C. 420 (1967), appears at Appendix C, *infra*, pages 18a to 29a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 13, 1973. A petition for rehearing was denied on February 21, 1974. This Court has jurisdiction to review the judgment under Section 2154(1) of Title 28 of the United States Code, which provides that cases in the courts of appeals may be reviewed by this Court by "writ of certiorari granted upon the petition of any party."

QUESTION PRESENTED

Is the statutory provision excepting from the jurisdiction of courts of appeals judgments of three-judge district courts setting aside orders of the Interstate Commerce Commission rendered inapplicable on the premise that the jurisdiction of a three-judge court properly convened to entertain a suit to set aside such an order is defeated by a subsequent change in circumstances?

STATUTES INVOLVED

28 U.S.C. § 2321:

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

28 U.S.C. § 2325:

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

28 U.S.C. § 1253:

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 1291:

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

On August 1, 1964 the Interstate Commerce Commission permitted Petitioners here, together with some 1,400 other motor common carriers, to effect a general increase of 3 percent in their Transcontinental rates. At the same time, it instituted a formal proceeding on the lawfulness of the increase under Section 216(g) of the Interstate Commerce Act, 49 U.S.C. 316(g). On April 15, 1966 the Commission issued its decision in that proceeding, reported in *Increased Class and Commodity Rates, Transcontinental*, 326 I.C.C. 397 (1966). Revers-

ing the initial decision of its hearing examiner, the Commission found the increase "not shown to be just and reasonable" and ordered it cancelled. By subsequent order it fixed September 12, 1966 as the date for cancellation.

The carriers brought suit to set aside the Commission's order in the United States District Court for the District of Colorado pursuant to 28 U.S.C. § 1336(a) and 49 U.S.C. § 17(9). A three-judge court was convened as required by 28 U.S.C. § 2325. On January 5, 1967 the Court vacated the order, which it had restrained *pendente lite*, and remanded the case to the Commission for further proceedings. *Ringsby Truck Lines, Inc., et al.* v. *United States, et al.*, 263 F. Supp. 552 (D. Colo. 1967). On February 1, 1967 the Commission responded to the remand by issuing a new decision. It again found the increase in rates "not shown to be just and reasonable" and again ordered it cancelled by a date certain. However, it stayed the order of cancellation pending judicial review if review were sought.

On February 27, 1967, the carriers again brought suit to set aside the Commission's order in the United States District Court for the District of Colorado. A three-judge court was again convened as required by 28 U.S.C. § 2325. On September 4, 1968 The National Small Shipments Traffic Conference, Inc. and Drug and Toilet Preparation Conference, Inc. (Shippers hereinafter) were permitted to intervene in the suit and file a counterclaim for the restitution of monies collected by the carriers under the increase the Commission had ordered cancelled. In the meantime, on August 29, 1967 the carriers superseded the increase at issue by a greater increase which in turn was superseded by several successive increases. Although protests were filed against the increase of Au-

gust 29, 1967 the Commission, in the exercise of its discretion, refused to suspend or investigate it.[1]

On March 2, 1972, the three-judge District Court vacated and set aside the Commission's order of February 1, 1967 and remanded the case to it "for such further proceedings as may be appropriate." Neither the Commission nor the United States took an appeal from that judgment. However, Shippers filed an appeal to this Court, as well as to the United States Court of Appeals for the Tenth Circuit. On October 24, 1972 this Court dismissed the appeal "for want of jurisdiction." *National Small Shipments Traffic Conference, et al.* v. *Ringsby Truck Lines, et al.*, 409 U.S. 943. The Court of Appeals then proceeded to hear the appeal to it. On December 13, 1973 it rendered its decision. It first held that it had jurisdiction of the appeal because the case should have been heard by a one-judge rather than a three-judge district court. It then vacated the judgment setting aside the Commission's order and remanded the case to the District Court with instructions that a single judge entertain Shippers' counterclaim. A writ of certiorari is sought to review the holding of the Court of Appeals that it had jurisdiction to entertain Shippers' appeal.

REASONS FOR ISSUANCE OF THE WRIT

There are indeed what Rule 19(1) of this Court describes as "special and important reasons" for the issuance of a writ of certiorari in this case. The decision of the Court of Appeals for the Tenth Circuit is in conflict, not with a decision of another court of appeals, but with two decisions of three-judge district courts in

[1] The Commission's refusal to suspend or investigate that increase was held to be a lawful exercise of its discretion. *National Industrial Traffic League* v. *U. S. and I.C.C.*, 287 F. Supp. 129 (D. D.C. 1968), aff'd *per curiam*, 393 U.S. 535 (1969).

the Tenth Circuit.[2] Such district courts are of course of equal rank with courts of appeals in the federal judicial system. "[A]s the District Court is thus constituted of at least three judges who might constitute a Circuit Court of Appeals, it is to be ranked with that court in the weight to be given its conclusions." William Howard Taft, *The Jurisdiction of the Supreme Court under the Act of February 13, 1925*, 35 Yale L. J. 1, 5-6 (1925).

Furthermore, the Court of Appeals "decide[d] a federal question in a way in conflict with applicable decisions of this Court." The federal question so decided is a most important one because it goes to the distribution of jurisdiction among the courts of the United States. Section 2 of Article III of the Constitution gives the Congress the power to regulate the appellate jurisdiction of this Court and to create inferior courts and to fix their jurisdiction, and the Congress has exercised that power with great care and particularity. Nothing is more fundamental to the orderly and efficient exercise of the federal judicial power than that the federal courts observe the distribution of jurisdiction among them that the Congress has prescribed. Thus, it is settled law that lack of jurisdiction over the subject matter of a particular action in a particular federal court cannot be waived, and that federal courts must determine their jurisdiction *vel non* whether or not the parties put it in issue. It is for this reason that they require persons seeking to invoke their jurisdiction to state the grounds upon which it depends. See Rules 10 and 23 of this Court; Rule 8(a) of the Rules of Civil Procedure for the United States District Courts.

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[2] *Admiral Merchants Motor Freight, Inc.* v. *U.S.*, 321 F. Supp. 353 (D. Colo., 1971) aff'd. *per curiam*. 404 U.S. 802, and the decision of the three-judge district court in this case.

The Court of Appeals, in an opinion by Chief Judge Lewis, grounded its holding that it had jurisdiction as follows: Between the time the three-judge District Court was convened and the time the case was heard the increase that the Commission had ordered cancelled had been superseded by further increases. Hence, there was no need for an injunction against the Commission and a "determination of the validity of the ICC order was of practical import only as it related to [Shippers' counterclaim for restitution]. The ICC order thus became essentially one for the payment of money and was properly reviewable by a one-judge rather than a three-judge district court." Appendix A, page 7a.

The holding of the Court of Appeals of course conflicts with the holding of the three-judge District Court from whose judgment it erroneously entertained an appeal.[3] It also squarely conflicts with *Admiral Merchants Motor Freight, Inc.* v. *U. S.*, 321 F. Supp. 353 (D. Colo. 1971), aff'd *per curiam*, 404 U.S. 802. In that case, as in the case at bar, the Commission found an increase in the rates of motor common carriers not shown to be just and reasonable and ordered it cancelled by a date certain. In addition, its order there, unlike its order here, provided as follows:

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[3] No party challenged the jurisdiction of the three-judge court while the case was before it. Counsel for the Government was asked from the Bench what the Court could do in view of the passage of years and further increases in rates. He answered: "The Court can sustain the Commission's decision and dismiss the Complaint and refer the matter of restitution to a single judge court. That's what the Court can do." Counsel for shippers answered the Court's inquiry as follows: "They have come to you and they have said, 'cancel an order of an administrative agency of the United States.' Now there are some legal consequences that flow from that, but they have no right to ask a federal district court to do that until they ask it of three judges, and we in turn have asked this Court, the Federal District Court of Colorado, for relief on our counterclaim."

> "[T]he [carriers] be, and they are hereby, required to refund to shippers the charges on shipments moving after May 20, 1968, to the extent that such charges included the increases herein found not shown to be just and reasonable." 321 F. Supp. at 356.

The carriers brought suit to set aside *only* the quoted portion of the Commission's order. The United States and the Commission challenged the jurisdiction of a three-judge court to review an order that did no more than require carriers to pay money to shippers. The Court, in an opinion subscribed to by Chief Judge Lewis, the author of the opinion in the case at bar, held that the suit was "not to be classified as an action to enforce the payment of money" within the meaning of 28 U.S.C. § 2321 and that it was therefore "duty bound to entertain the suit and to determine it on its merits." 321 F. Supp. at 357. On the merits the Court held that annulment of the Commission's order was not justified and entered judgment dismissing the carriers' complaint.

On direct appeal to this Court by the carriers, the United States and the Commission moved for dismissal on the ground that the Commission's order was one for the payment of money and therefore not reviewable by a three-judge court and not reviewable by this Court on appeal. This Court affirmed the judgment *per curiam*, 404 U.S. 802 (1971), and denied a petition for rehearing of that affirmance. 404 U.S. 987 (1971). This Court is well aware of the distinction between a holding that a federal court lacks jurisdiction to entertain a claim and a holding that a claim has no merit. In *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), it was at pains to make the distinction and correct the judgment it affirmed from one of dismissal for want of jurisdiction to one of dismissal for failure to establish a cause of action. Hence, this Court's affirmance in *Admiral Merchants* was necessarily

a denial of the motion to dismiss the appeal for want of jurisdiction and the exercise of jurisdiction to review the merits of the judgment of the three-judge court.

Referring to the fact that this Court dismissed Shippers' direct appeal from the judgment of the District Court in the case at bar for "want of jurisdiction", the Court of Appeals said:

> "In the absence of an articulated reason for this dismissal, we will not presume to engage in a meaningless exercise of reading that Court's mind. It is sufficient to note for our purposes that the appeal could have been dismissed because the Court felt that the three-judge court below was not required." (Appendix A, p. 7a).

In the light of this Court's affirmance of the judgment in *Admiral Merchants* the Court of Appeals was clearly wrong. Whatever the reason for this Court's conclusion that it lacked jurisdiction of Shippers' appeal in the case at bar, it was not because the Commission's order directing the cancellation of an increase in rates was reviewable by a single-judge District Court.

Other reasons for this Court's conclusion that it lacked jurisdiction of Shippers' appeal suggest themselves.[4] Since the increase to which the Commission's order was addressed had been superseded by further increases, there was no need to determine, and the District Court did not determine, whether the order requiring the increase to be cancelled was valid or invalid. *Mechling Barge Lines, Inc.* v. *U. S.*, 368 U.S. 324 (1961).[5] Hence, there

[4] The carriers, as well as the United States and the Commission, moved to dismiss Shippers' appeal. The carriers urged several grounds, but not that the case was one for a single judge.

[5] In these circumstances, the vacation of the Commission's order by the District Court was the appropriate disposition of the case. *United States* v. *Munsingwear*, 340 U.S. 36 (1950). As this Court said in *Mechling*, that disposition assures that the parties are not

was no "case or controversy" between the carriers and the Commission within the appellate jurisdiction of this Court. *De Funis* v. *Odegaard*, 42 L. Wk. 4578 (April 23, 1974). Shippers' complaint for restitution is of course a separate and distinct "case or controversy" between them and the carriers.[6] That "case or controversy" is not one for a three-judge court, *Public Service Commission* v. *Brashear Freight Lines*, 312 U.S. 621 (1941), and was not entertained by the District Court. Hence, it was not within the appellate jurisdiction of this Court.

The Court of Appeals recognized that the Commission's order in the case at bar was reviewable only by a three-judge district court at the time suit to review it was brought. Its rationale was that the subsequent action of the carriers and the Commission superseding the increase made injunctive relief unnecessary and rendered the order "essentially one for the payment of money" and defeated the jurisdiction of the three-judge court. We submit that this proposition is untenable.

In the first place, the settled rule is that the jurisdiction of a federal court is determined by the situation existing at the time suit is begun. Once jurisdiction has attached it is not defeated by a subsequent change

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"concluded in subsequent litigation" by an order of the Commission that has not been finally determined to be valid or invalid. 368 U.S. at 329. Shippers are free to attack, and carriers free to defend, the lawfulness of the charges paid in a proceeding before the Commission ancillary to a suit for reparations authorized by Section 204a of the Interstate Commerce Act, 49 U.S.C. 304a.

[6] Assuming *arguendo*, the validity of the Commission's order, it does not follow that shippers are entitled to restitution. "A cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function." *Atlantic Coast Line R. Co.* v. *Florida*, 295 U.S. 301, 309 (1935). Shippers must therefore establish that the carriers cannot in good conscience keep the charges paid them.

in circumstances. Thus, whether the amount in controversy is sufficient for jurisdiction under 28 U.S.C. §§ 1331 and 1332 is determined by the amount claimed by the plaintiff in good faith. *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 282 (1938). Whether there is diversity of citizenship is determined from the pleadings, *Smith* v. *Sperling*, 354 U.S. 91 (1957), and a subsequent change in the citizenship of one of the parties does not defeat diversity jurisdiction. *Brough* v. *Strathmann Supply Co., Inc.*, 358 F. 2d 374 (3rd Cir. 1966). Once a three-judge district court has been convened a plaintiff will not be permitted to amend his pleadings by withdrawing the Constitutional question that gives the court jurisdiction. *Texas Electric Ry. Co.* v. *Eastus*, 25 F. Supp. 825 (N.D. Tex. 1938), aff'd *per curiam*, 308 U.S. 512.

In the second place, whether an order of the Commission is reviewable in a three-judge district court depends, not upon the terms of the order, but rather upon the nature of the proceeding in which the order is issued. Thus, in *Admiral Merchants, supra*, as in the case at bar, the Commission's order was issued in a proceeding under Section 216(g) of the Interstate Commerce Act, 49 U.S.C. 316(g), to determine whether an increase in rates was just and reasonable. The Commission issued an order directing the carriers to cancel the increase and refund the monies that had been collected thereunder. The three-judge district court held that the carriers' suit to review the requirement that they make refund was "not to be classified as an action for the payment of money" within the meaning of 28 U.S.C. § 2321. 321 F. Supp. at 357. This is the teaching of this Court's decisions.

I.C.C. v. *Atlantic Coast Line R. Co.*, 383 U.S. 576 (1966), held that a railroad can secure judicial review of an order of the Commission awarding damages to a

shipper only in the court where the shipper brings suit to enforce it. In so holding this Court was at pains to emphasize that if an order goes beyond an award of reparations, e.g., directs a carrier to establish a particular rate or to cease and desist from charging a particular rate, it is reviewable only by way of suit in a three-judge court. In other words this Court made clear that the only orders that may be reviewed by a single-judge district court are orders entered by the Commission in proceedings in which the sole issue is whether or not a carrier should be required to pay money for alleged past transgressions of the Interstate Commerce Act.

In *United States* v. *I.C.C.*, 337 U.S. 426 (1949), the Government, as a shipper, filed a complaint for damages with the Commission under Section 9 of the Interstate Commerce Act, grounded on the allegation that the railroads had collected unreasonable charges upon specific past shipments. This Court held that the Commission's order denying damages was judicially reviewable in a one-judge district court. Its rationale was that, while the Government was not seeking to enforce an order for the payment of money, "the root of the controversy concerns the payment of money damages under [Section 9]." Since suit to enforce an order awarding damages would be reviewed by a one-judge court, such a court "would appear to be an equally appropriate and adequate tribunal" for reviewing an order denying damages. 337 U.S. at 443.

The Court of Appeals here relied on *Pennsylvania Railroad Co.* v. *U. S.*, 363 U.S. 202 (1960). The reliance is misplaced. In that case the United States had refused to pay a railroad the freight charges on 75 shipments on the ground that the rates on which the charges were based were unreasonable. The railroad brought suit in the Court of Claims to recover the charges. The

Court of Claims stayed proceedings to enable the Commission to determine the reasonableness of the rates. After hearing, the Commission found that the rates were unjust and unreasonable as to 62 shipments and just and reasonable as to 13. The railroad brought suit in a United States District Court to review the order. The Court of Claims refused to stay proceedings on the ground that the order was not reviewable and entered judgment on the basis of the order. This Court reversed. It held the Commission's order reviewable under 28 U.S.C. § 1336 and 49 U.S.C. § 17(9). The Court then went on to say that the order was reviewable by a one-judge rather than a three-judge court because it was "essentially one 'for the payment of money' within the terms of 28 U.S.C. §§ 2321 and 2325," citing as authority *U. S.* v. *I.C.C.*, *supra.*

In *Pennsylvania*, as in *U. S.* v. *I.C.C.* and *Atlantic Coast Line*, the only issue in the proceeding before the Commission was whether a shipper was entitled to reparations. It is distinguishable from those cases only in that the proceeding was instituted upon a referral by the Court of Claims rather than upon the filing of a complaint for damages. This is a distinction without a difference. Hence, *Pennsylvania* is not authority for the proposition that, as the Court of Appeals held, an order directing carriers to cancel an increase in rates and therefore properly reviewable only in a three-judge court is converted by supervening events into "one for the payment of money."

The Court of Appeals noted that whether it had jurisdiction depended upon whether the "dispositive issue require[d] the consideration of a three-judge court." The dispositive issue, indeed the only issue, was the validity *vel non* of the finding by the Commission that an increase in rates had not been shown to be just and reasonable and the order requiring the increase to be can-

celled. It is true, as the Court said, that the "necessity for injunctive relief against [enforcement of the] order was obviated" by supervening events. But there was a necessity for the Court to determine whether or not, in the words of 28 U.S.C. § 2321, to "annul or set aside in whole or in part [an] order of the Interstate Commerce Commission other than for the payment of money . . . ."

PRAYER

For all of the foregoing reasons Petitioners pray the Court to issue a writ of certiorari to the United States Court of Appeals for the Tenth Circuit and, upon review of the record in that Court, reverse its judgment and remand the case to it with directions to dismiss the appeal to it for want of jurisdiction.

Respectfully

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May 22, 1974

CERTIFICATE OF SERVICE

I, Bryce Rea, Jr., one of counsel for petitioners herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 22nd day of May, 1974, I mailed copies of the foregoing document, first class postage prepaid, to the following:

Honorable William B. Saxbe, Attorney General, Department of Justice, Washington, D. C. 20530, Honorable Robert H. Bork, Solicitor General, Department of Justice, Washington, D. C. 20530, and Honorable James L. Treece, United States Attorney, 323 United States Court House, Denver, Colorado 80202.

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BRYCE REA, JR.